

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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3	TUNG V. TRAN,	)	No. C 10-04779 CW (PR)
4	Plaintiff,	)	
5	v.	)	ORDER GRANTING IN FORMA
6		)	PAUPERIS STATUS; AND
7	DENNIS M. CARR, et al.,	)	DISMISSING ACTION
8	Defendants.	)	

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INTRODUCTION

Plaintiff Tung V. Tran is a state prisoner who is currently incarcerated at High Desert State Prison. He has filed this pro se civil rights action and seeks leave to proceed in forma pauperis. He claims his "due process rights were violated when he was denied the right to have his day in court." (Compl. at 4.) Plaintiff seems to be referring to a denial of due process rights in his state court case in the San Mateo County Superior Court dealing with a 1998 car accident, which was dismissed on January 5, 2009.

On January 25, 2006, Plaintiff filed a previous federal civil rights action relating to the same 1998 car accident alleged in the present complaint. See Tran v. Carr, Case No. C 06-0476 CW (PR). Upon reviewing that complaint in an Order dated December 24, 2006, the Court included the following background:

In his complaint, Plaintiff accuses Defendant Dennis M. Carr, of the Law Offices of Dennis M. Carr, of legal malpractice in administering claims stemming from a lawsuit against Allstate Insurance Company for injuries Plaintiff sustained in a car accident in 1998. Also named as Defendants in this action are Defendants Norma Docker of Allstate Insurance Company, Karen Timmins of Farmers Insurance Group as well as the defendant in the aforementioned lawsuit, Johnny G. Carillo, who was insured with Allstate Insurance

1 Company. Plaintiff seeks damages for loss of settlement  
2 damages, for pain and suffering, and for emotional  
distress.

3 (Dec. 24, 2006 Order in Case No. C 06-0476 CW (PR) at 1-2.) The  
4 Court found that Plaintiff's claims against the named defendants  
5 were not cognizable. His allegations against Defendant Carr failed  
6 to state a claim for relief under § 1983 because "[a]ttorneys in  
7 private practice are private individuals and are not state actors."  
8 (Id. at 2-3 (citing Simmons v. Sacramento County Superior Court,  
9 318 F.3d 1156, 1161 (9th Cir. 2003)).) Plaintiff's claims against  
10 Defendants Docker, Timmins and Carillo were also dismissed because  
11 these defendants are not state actors and "[p]urely private  
12 conduct, no matter how wrongful, is not covered under § 1983."  
13 (Id. at 3 (citing Ouzts v. Maryland Nat'l Ins. Co., 505 F.2d 547,  
14 559 (9th Cir. 1974), cert. denied, 421 U.S. 949 (1975)).)  
15 Therefore, the Court dismissed Plaintiff's previous action with  
16 prejudice. However, the Court clarified that "this Order does not  
17 prevent Plaintiff from seeking relief for his legal malpractice  
18 claim in the State courts." (Id. at 3.)

19 In the present matter, the record shows that Plaintiff sought  
20 relief for his legal malpractice claim in state court. See Tran v.  
21 Carr, et al., San Mateo Superior Court Case No. CIV457659.  
22 However, that action was dismissed by the state superior court on  
23 January 5, 2009. Plaintiff, who is Vietnamese, claims that he "did  
24 not understand that he needed to file the required documents to  
25 appear at the trial . . . and because he did not appeal  
26 (telephonically) at trial, the Superior Court Judge dismissed his  
27 case entirely." (Compl. at 5.) Plaintiff claims that he had  
28 requested a Vietnamese translator, but one was not provided.

1 Plaintiff "appealed on March 26, 2009." (Id.) However, after  
2 Plaintiff requested a status update on his appeal, he was informed  
3 on July 8, 2009 that his appeal was not received by the state court  
4 of appeal. Plaintiff then "resorted to filing of the untimely July  
5 21, 2009 appeal." (Id. at 6.) On October 23, 2009, the state  
6 court of appeal "dismissed the Plaintiff's appeal asserting, 'To  
7 the contrary, the proof of service attached to the earlier notice  
8 of appeal reflects that it was mailed without an address for that  
9 court . . . [and] because the only operative notice of appeal is  
10 the untimely July 21, 2009 notice of appeal, the above-referenced  
11 appeal is hereby dismissed.'" (Id.) Plaintiff filed a petition  
12 for review in the state supreme court stating that "not having the  
13 address accompanying the title of the court on the Proof of Service  
14 did not affect its adequacy." (Id.) On February 17, 2010, the  
15 state supreme court sent Plaintiff a letter stating that "his  
16 petition cannot be entertained because the petition was filed  
17 late." (Id.)

18 Here, under the "Relief" section of the complaint, Plaintiff  
19 "request[s] that this court made a determination of whether he  
20 would have the legal right to procede [sic] in the appeal of the  
21 Superior Court's ruling, the court of appeals determination that  
22 the appeal was not timely submitted, and the California Supreme  
23 Court's lack of jurisdiction." (Id. at 3, 4b<sup>1</sup>.) Based on the  
24 relief sought in this action, Plaintiff seems to be seeking a writ  
25 of mandamus to challenge the failure by the state courts to rule on  
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27 <sup>1</sup> The Court refers to the last page of the complaint as "4b"  
28 because Plaintiff has attached four hand-written pages to page three  
of the complaint, which were numbered "4" through "7."

1 the merits of his action relating to the 1998 car accident.

2 DISCUSSION

3 I. Standard

4 Federal courts must engage in a preliminary screening of cases  
5 in which prisoners seek redress from a governmental entity or  
6 officer or employee of a governmental entity. 28 U.S.C.

7 § 1915A(a). The Court must identify cognizable claims or dismiss  
8 the complaint, or any portion of the complaint, if the complaint  
9 "is frivolous, malicious, or fails to state a claim upon which  
10 relief may be granted," or "seeks monetary relief from a defendant  
11 who is immune from such relief." Id. § 1915A(b). However, pro se  
12 pleadings must be liberally construed. Balistreri v. Pacifica  
13 Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

14 II. Writ of Mandamus

15 The federal mandamus statute provides: "The district courts  
16 shall have original jurisdiction of any action in the nature of  
17 mandamus to compel an officer or employee of the United States or  
18 any agency thereof to perform a duty owed to the plaintiff." 28  
19 U.S.C. § 1361.

20 However, this Court has no authority to take the actions  
21 requested by Plaintiff by way of a writ of mandamus. Federal  
22 courts are without power to issue mandamus to direct state courts,  
23 state judicial officers, or other state officials in the  
24 performance of their duties. A petition for mandamus to compel a  
25 state court or official to take or refrain from some action is  
26 frivolous as a matter of law. See Demos v. U.S. District Court,  
27 925 F.2d 1160, 1161-62 (9th Cir.), cert. denied, 111 S. Ct. 1082  
28 (1991); see also In re Campbell, 264 F.3d 730, 731-32 (7th Cir.

2001) (denying petition for writ of mandamus that would order state trial court to give plaintiff access to certain trial transcripts which he sought in preparation for filing state post-conviction petition; federal court may not, as a general rule, issue mandamus to a state judicial officer to control or interfere with state court litigation).

CONCLUSION

Accordingly, this action is DISMISSED for failure to state a claim upon which relief may be granted. 28 U.S.C. § 1915A.

Leave to proceed in forma pauperis is GRANTED (docket no. 4). The total filing fee due is \$350.00. The initial partial filing fee due for Plaintiff at this time is \$1.07. A copy of this Order and the attached instruction sheet will be sent to Plaintiff, the Prison Trust Account Office and the Court's Financial Office.

All pending motions are TERMINATED. The Court certifies that any appeal is not taken in good faith. 28 U.S.C. § 1915(a)(3). The Clerk of the Court shall enter judgment in accordance with this Order and close the file.

This Order terminates Docket no. 4.

IT IS SO ORDERED.

DATED: 12/1/2010

  
\_\_\_\_\_  
CLAUDIA WILKEN  
United States District Judge

1 UNITED STATES DISTRICT COURT  
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3 INSTRUCTIONS FOR PAYMENT OF PRISONER'S FILING FEE

4 The prisoner shown as the plaintiff or petitioner on the attached  
5 order has filed a civil action in forma pauperis in this court and  
6 owes to the court a filing fee. Pursuant to 28 U.S.C. § 1915, the  
fee is to be paid as follows:

7 The initial partial filing fee listed on the attached  
8 order should be deducted by the prison trust account office  
9 from the prisoner's trust account and forwarded to the clerk  
10 of the court as the first installment payment on the filing  
11 fee. This amount is twenty percent of the greater of (a) the  
12 average monthly deposits to the prisoner's account for the  
6-month period immediately preceding the filing of the  
complaint/petition or (b) the average monthly balance in the  
prisoner's account for the 6-month period immediately  
preceding the filing of the complaint/petition.

13 Thereafter, on a monthly basis, 20 percent of the  
14 preceding month's income credited to the prisoner's trust  
15 account should be deducted and forwarded to the court each  
time the amount in the account exceeds ten dollars (\$10.00).  
The prison trust account office should continue to do this  
until the filing fee has been paid in full.

16 If the prisoner does not have sufficient funds in his/her account  
17 to pay the initial partial filing fee, the prison trust account  
18 office should forward the available funds, and carry the balance  
forward each month until the amount is fully paid.

19 If the prisoner has filed more than one complaint, (s)he is  
20 required to pay a filing fee for each case. The trust account  
21 office should make the monthly calculations and payments for each  
case in which it receives an order granting in forma pauperis and  
these instructions.

22 **The prisoner's name and case number must be noted on each**  
23 **remittance.** The initial partial filing fee is due within thirty  
24 days of the date of the attached order. Checks should be made  
payable to Clerk, U.S. District Court and sent to Prisoner Accounts  
Receivable, U.S. District Court, 450 Golden Gate Avenue, Box 36060,  
San Francisco, CA 94102.

25 cc: Plaintiff/Petitioner  
26 Finance Office  
27  
28

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

TUNG,

Plaintiff,

v.

TRAN-V-DENNIS M. CARR et al,

Defendant.

Case Number: CV10-04779 CW

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on December 2, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Tung V. Tran T-42650  
High Desert State Prison  
P.O. Box 3030  
Facility A, Bldg. #2-112L  
Susanville, CA 96127

Prison Trust Account Office  
High Desert State Prison  
P.O. Box 3030  
Facility A, Bldg. #2-112L  
Susanville, CA 96127

U.S. District Court  
Financial Office  
San Francisco, CA  
(sent via inter-office mail)

Dated: December 2, 2010

Richard W. Wieking, Clerk  
By: Nikki Riley, Deputy Clerk